STATE OF MICHIGAN

COURT OF APPEALS

GORDON SCOTT DITTMER,

Petitioner-Appellant,

v

DEPARTMENT OF CORRECTIONS, DEPARTMENT OF CORRECTIONS DIRECTOR, ST. LOUIS CORRECTIONAL FACILITY WARDEN, ST. LOUIS CORRECTIONAL FACILITY DEPUTY WARDEN, and ST. LOUIS CORRECTIONAL FACILITY CORRECTIONS OFFICER,

Respondents-Appellees.

UNPUBLISHED
June 16, 2011

No. 298997
Court of Claims
LC No. 09-000126-MP

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Petitioner appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) to respondents. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioner, an inmate with the Department of Corrections (MDOC), was incarcerated at the St. Louis Correctional Facility (SLF). On May 16, 2006, Steve Rivard, deputy warden of the SLF, issued an administrative order for petitioner to be placed in "punitive" or "protective" segregation. D. Thelen, a corrections officer at the SLF, assisted in moving petitioner to a temporary detention cell. According to petitioner, he was placed in segregation without notice or a hearing.

Petitioner remained in segregation for eight days, until May 24, 2006, when he was transferred to the Carson City Correctional Facility (DRF). Upon reporting to the DRF property room, petitioner discovered that a substantial amount of his personal property had either not been shipped from the SLF to the DRF or had become lost. According to petitioner, Thelen, who was designated the "packing officer," waited approximately 20 minutes after placing petitioner in the temporary detention cell to return to petitioner's cell to itemize and pack petitioner's belongings, failed to pack all of petitioner's belongings, and piled the belongings that he did pack under the prisoners' telephones.

Petitioner sued respondents in the Court of Claims. Petitioner alleged that he had liberty interests in receiving written notice for the cause of him being placed in a temporary detention cell, in having a hearing to determine whether his placement in segregation was warranted by MDOC policy, and in exercising "daily functions," such as accessing his religious books and using his typewriter to draft letters and legal materials, that he enjoyed prior to being placed in the temporary detention cell. Petitioner also alleged that he had property interests in receiving written notice of his belongings that were to be confiscated, in having a hearing to determine the disposition of those belongings, and in his personal belongings. Petitioner claimed that respondents violated his constitutional rights when they deprived him of these liberty and property interests without due process. In addition, petitioner alleged that Thelen intentionally misrepresented the personal belongings of petitioner when he itemized the belongings and that, during the grievance process, Thelen intentionally misrepresented the fact that he packed all of petitioner's belongings and that petitioner did not own a typewriter.

Petitioner filed an amended complaint. The amended complaint added J. Unruh, the library technician at the DRF, as a respondent. It also contained claims that petitioner was subjected to cruel and unusual punishment and was denied his rights of access to the courts and of freedom of religion and speech.[1]

The trial court granted respondents' motion for summary disposition under MCR 2.116(C)(7) for the reasons asserted by respondents. It concluded that Blaine Lafler, warden of the SLF, Rivard, and Thelen were not state officials and, therefore, it, as the Court of Claims, did not have jurisdiction to hear the claims against them. It held that the MDOC and Patricia Caruso, director of the MDOC, were entitled to immunity. Because Caruso was a "high executive official," she was entitled to absolute immunity. Because the operation of a corrections department was authorized and mandated by law and because petitioner did not allege that the basis of his claims against the MDOC fell within any of the six statutory exceptions to governmental immunity, the MDOC was entitled to governmental immunity. The trial court further held that, even if it had jurisdiction over Lafler, Rivard, and Thelen, they were entitled to governmental immunity because petitioner failed to allege any facts demonstrating

[1] We note that the amended complaint is not included in the lower court record; in fact, the register of actions does not even record the filing of the amended complaint. We include reference to the amended complaint because our analysis of petitioner's arguments on appeal remains the same regardless whether it is considered.

According to petitioner's brief on appeal, the amended complaint alleged that Unruh maintained possession and control of petitioner's pleadings that were to be filed in a collateral appeal with the Michigan Supreme Court until after the mailing deadline had passed and that Unruh refused to provide photocopy services to petitioner for certain legal documents. It appears that the claim that petitioner was subjected to cruel and unusual punishment relates to his treatment while in segregation, that the claim petitioner was denied right of access to the courts concerns his ability to get timely photocopy services, and the claims regarding freedom of religion and speech concern the disposal of petitioner's religious books and writing tools.

gross negligence or of their personal involvement in the activities that formed the basis of petitioner's claims.[2]

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . immunity granted by law . . . ." In reviewing a motion under MCR 2.116(C)(7), we must accept as true all well-pleaded allegations and construe them in the nonmoving party's favor, unless contradicted by affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). We also review de novo the applicability of governmental immunity. *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010).

III. ANALYSIS

On appeal, petitioner claims that the trial court erred in holding that the MDOC was entitled to governmental immunity on the basis that the operation of a corrections department was mandated and authorized by statute. Petitioner admits that the operation of a corrections department is mandated and authorized by statute, but claims that the actions that form the factual predicate of his claims, such as placing him in segregation without notice and a hearing, leaving his personal property piled underneath the prisoners' telephones, and refusing to provide photocopy services for his pro se pleadings, were ultra vires acts and, therefore, not covered by immunity. We disagree.

A governmental agency, which includes the state and any of its departments, MCL 691.1401(c), (d), is generally immune from tort liability when it exercises or discharges a governmental function. MCL 691.1407(1); *Bennett v Detroit Police Chief*, 274 Mich App 307, 315; 732 NW2d 164 (2007). A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). Ultra vires activity is activity not expressly or impliedly authorized by law. *Dextrom v Wexford Co*, 287 Mich App 406, 417; 789 NW2d 211 (2010). It "is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989). To determine whether a governmental agency is engaged in ultra vires activity, the focus must be on the general activity, not the specific conduct involved. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). A governmental agency is not immune from injuries that arise from ultra vires activity. *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004).

[2] The trial court did not acknowledge petitioner's admission that he had not served Thelen or Unruh with process and that he had no intention to do so.

Here, in arguing that the MDOC was engaged in ultra vires activity, petitioner focuses on the specific conduct by the MDOC employees that led to his claimed injuries, such as placing him in segregation without notice and a hearing. Petitioner's focus on the specific conduct by the MDOC employees is misplaced. The focus must be on the general activity of the MDOC, *Tate*, 256 Mich App at 661, and the general activity of the MDOC that led to plaintiff's claimed injuries was the operation of a correctional facility. Petitioner concedes that the MDOC is mandated and authorized by law to operate correctional facilities. Accordingly, we find no merit to petitioner's argument that the MDOC was not entitled to governmental immunity because it was engaged in ultra vires activity.

Petitioner further argues that the MDOC is vicariously liable for the acts of the MDOC employees. According to petitioner, the acts of the MDOC employees were within the scope of the employees' employment but were ultra vires activity. We disagree.

"A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984). "[I]f the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function . . . the agency is immune . . . ." *Id.* Again, the focus must be the general activity of the tortfeasors, not the alleged tortious acts. *Giddings v Detroit*, 178 Mich App 749, 759; 444 NW2d 242 (1989). Petitioner focuses on the alleged tortious acts of the MDOC employees, rather than the general activities in which they were involved. We find nothing in the record to suggest the MDOC employees, when committing the acts which led to petitioner's claimed injuries, were not engaged in the operation of a correctional facility, which a governmental function. Accordingly, we find no merit to petitioner's claim that the MDOC is vicariously liable for the acts of its employees that caused petitioner's claimed injuries.

Petitioner next argues on appeal that the trial court erred in granting summary disposition to Caruso, Lafler, Rivard, Thelen, and Unruh. According to petitioner, he alleged acts of gross negligence by them.

We need not address the merits of petitioner's argument. The trial court held that, pursuant to MCL 691.1407(5), Caruso, as director of the MDOC, was entitled to absolute immunity.[3] Petitioner makes no argument that the trial court erred in this conclusion. Regarding Lafler, Rivard, and Thelen, the trial court held that it, as the Court of Claims, did not have

[3] MCL 691.1407(5) provides:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

jurisdiction to hear claims against them as they were not state officers.[4] Petitioner makes no argument that Lafler, Rivard, and Thelen are state officers, thereby granting the trial court jurisdiction to hear his claims against them. Finally, petitioner acknowledged in his second response to the motion for summary disposition that he had not served either Thelen or Unruh with process and that he had no intention to do so. Accordingly, any claims against Thelen or Unruh are deemed dismissed. See MCR 2.102(E)(1) ("On the expiration of the summons . . . the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction.").

Petitioner also argues on appeal that the trial court erred in granting summary disposition to the MDOC because it failed to recognize that governmental immunity is not a defense to claims for violations of rights conferred by the Michigan constitution. We disagree.

"Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Mich Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). "[T]he state will be liable for a violation of the state constitution only in cases where a state custom or policy mandated the official's or employee's actions." *Reid v Michigan*, 239 Mich App 621, 629; 609 NW2d 215 (2000); see also *Carlton v Dep't of Corrections*, 215 Mich App 490, 504-505; 546 NW2d 671 (1996). Petitioner has not identified any custom or policy implemented by the MDOC that mandated any of the actions of the MDOC employees that led to his claimed injuries. Thus, petitioner's allegations that rights afforded him under the Michigan constitution were violated did not preclude the trial court from granting summary disposition to the MDOC.

Finally, on appeal, petitioner argues that the trial court erred in granting summary disposition to the MDOC because it failed to recognize that governmental immunity is not a defense to claims for violations of rights conferred by the United States constitution. We disagree. We have reviewed the four cases petitioner cites in support of his argument. None of them discuss if, or when, a state loses its immunity when a petitioner alleges that the state has violated rights afforded by the federal constitution.[5] Petitioner, therefore, fails to demonstrate any error by the trial court.

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[4] The Court of Claims, which is a court of limited jurisdiction, *Oakland Co v Dep't of Human Servs*, ___ Mich App ___; ___ NW2d ___ (2010), has exclusive jurisdiction to hear claims against the state and any of its departments, commissions, boards, institutions, arms, or agencies. MCL 600.6419; *Steele v Dep't of Corrections*, 215 Mich App 710, 715; 546 NW2d 725 (1996). Its jurisdiction extends to state officers when the officer was acting in an official capacity. *Steele*, 215 Mich App at 715.

[5] The pertinent portions of the cases generally discussed 42 USC 1983, which reads, "Every person who, under color of any statute . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." Petitioner did not assert any claims under §

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

1983. Moreover, a state is not a "person" under § 1983. *Will v Mich Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45 (1989).